SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

THE WASHINGTON HARBOUR
3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202) 424-7500
FACSIMILE (202) 424-7643
WWW.SWIDLAW.COM

NEW YORK OFFICE
THE CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, NY 10174
TEL.(212) 973-0111
FAX (212) 891-9598

November 4, 2002

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation by Vycera Communications, Inc. Concerning Application by SBC Communications, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in California, WC Docket No. 02-306
Notice of Ex Parte Meeting Pursuant to Rule 1.1206(b)

Dear Secretary Dortch:

On November 1, 2002, the undersigned, Katherine Rolph and Rogena Harris of Swidler Berlin Shereff Friedman, LLP, together with Derek Gietzen of Vycera Communications, Inc. ("Vycera") (who participated via teleconference), made an *ex parte* presentation in the above-referenced proceeding to Renee Crittendon, John Stanley, Jack Yachbes, Pamela Arluk, Katie Rangos, and Rhonda Lien of the Federal Communications Commission's ("Commission's" or "FCC's") Wireline Competition Bureau, Sean O'More of the FCC's Consumer and Governmental Affairs Bureau, and Joanne Wall of the FCC's Office of General Counsel. The presentation addressed problems Vycera has experienced in regard to SBC-Pacific Bell's abuse of its position as non-neutral PC administrator, and proposed measures to prevent such anti-competitive practices; SBC-Pacific Bell's ongoing billing errors that do not appear to be reflected in its metrics reporting; and its refusal to allow Vycera to opt into a California interconnection agreement as required by Section 252(i), FCC rules, and California Public Utilities Commission ("California PUC") rules. Vycera is filing this letter electronically through the Commission's Electronic Comment Filing System.

Billing Errors

The billing metrics reported by SBC-Pacific Bell do not appear to capture the billing problems experienced by Vycera. The billing accuracy metrics have not reflected Vycera's actual commercial experience with SBC-Pacific Bell billing, as they do not appear to measure properly the adjustments made by SBC-Pacific Bell to resolve billing accuracy disputes. As discussed in Vycera's October 25, 2002 *ex parte* filing, SBC-Pacific Bell does not correct its previous bills when it admits an error. Vycera believes that since SBC does not correct the bills, the errors are not reflected in SBC-Pacific Bell's reporting metrics. On average during the course of the last two years the disputes/billing errors on Vycera's SBC-Pacific Bell bills have averaged approximately 10 percent. Vycera was invited to provide additional information which might explain the disparity between the metrics as reported by SBC and Vycera's actual experience with SBC billing.

Vycera noted that when it raises a billing dispute, SBC-Pacific Bell typically summarily dismisses it. Vycera then continues to pursue resolution of the disputed items until SBC-Pacific Bell eventually admits the error(s). SBC-Pacific Bell's practice of summarily dismissing billing disputes likely contributes to the inaccuracy of its billing metrics.

Another billing problem addressed at the meeting which also may affect the accuracy of SBC's billing metrics is SBC-Pacific Bell's failure to issue a credit when it knows credit is due, unless and until Vycera catches the error and demands credit. For example, Pacific Bell billed Vycera for the "Works Package" at $37.65, when the proper amount should have been $16.56. When Vycera discovered the overbilling in mid-2001, its audit revealed that SBC-Pacific Bell caught the overbilling error in December 2000, because at that time SBC-Pacific Bell began billing Vycera $16.56 going forward. However, SBC-Pacific Bell did not mention or issue credit to Vycera for the Works Package overbillings prior to December 2000. Vycera discovered the Works Package calendar year 2000 overbillings in mid-2001, and received a partial credit in September 2002 for these calendar year 2000 overbillings, but has yet to be issued full credit for these overbillings.

Vycera must spend a great deal of time and effort in auditing SBC-Pacific Bell bills in light of the pervasive and continuing billing problems that it has experienced with SBC-Pacific Bell. The billing metrics may not accurately reflect SBC-Pacific Bell's actual performance in part because not all CLECs have not instituted the type of expensive, time-consuming auditing procedures that Vycera has found it necessary to implement to counter the pervasive Pacific Bell billing error problems. Based on information and belief, Vycera believes that SBC-Pacific Bell does not correct the bills for other CLECs when Vycera (or other CLECs) bring billing errors to SBC-Pacific Bell's attention. Accordingly, Vycera believes that a significant amount of billing problems are not included in the performance metrics because SBC-Pacific Bell does not correct the problems both going forward and going back in time, and does not correct the problems on a uniform basis for all CLECs that have been overbilled for identical problems, unless and until each CLEC raises the billing error (of which SBC-Pacific Bell already is aware) to SBC-Pacific Bell's attention. Vycera believes that it is unlikely that the billing metrics constitute a fully effective means of ensuring that billing problems are resolved.

<u>California Interconnection Issues</u>

With respect to interconnection issues discussed at the meeting, Vycera's representatives outlined the problems it has encountered when trying to simply opt into a SBC-Pacific Bell interconnection agreement in California. As explained in Vycera's comments, instead of allowing Vycera to opt into the agreement as required by Section 252(i) of the

Telecommunications Act of 1996, the FCC's rules, and California PUC rules, SBC-Pacific Bell instead filed a request for arbitration based on untenable legal arguments. In short, SBC-Pacific Bell's tactics are in contravention of both the explicit requirements of Section 252(i) of the Telecommunications Act of 1996, the FCC's rules, and the California rules (which were meant to expedite the opt-in process, not to provide SBC-Pacific Bell with additional months of delay in response to Section 252(i) interconnection opt-in requests). SBC-Pacific Bell's delay tactics with respect to Vycera's California opt-in request have cost Vycera a great deal of time, expense, and lost opportunity. As discussed in Vycera's comments, SBC-Pacific Bell fails to satisfy Checklist Item 1 because it refuses to permit CLECs to adopt interconnection agreements on a nondiscriminatory basis. SBC-Pacific Bell's tactics to delay compliance with opt-in requests for as long as possible, and to require CLECs such as Vycera to expend as much time and money as possible in order to be able to opt into existing interconnection agreements, also are contrary to the public interest.

Commission Staff invited Vycera to provide recommendations regarding how the interconnection rules could be revised to avoid such delay tactics on the part of SBC-Pacific Bell with respect to opt-in agreements. Vycera plans to file a separate *ex parte* letter addressing this issue.

<u>SBC-Pacific Bell's Abuse of its Position as Non-Neutral PC Administrator; Proposed Measures to Prevent Such Anti-Competitive Practices</u>

Vycera also discussed serious problems with extremely inflated numbers of alleged PC disputes (and related charges) assessed to Vycera's account by SBC-Pacific Bell during periods when Vycera offered intraLATA toll service in competition with SBC-Pacific Bell. As discussed in Vycera's comments, as a result of such practices, Vycera had no economic choice but to cease offering intraLATA toll service in SBC-Pacific Bell's service areas.

As discussed in its comments, Vycera reiterated that it has not experienced these problems with other ILECs in any other service territories (including Verizon territories in California and Texas, and ILEC territories in other states), with the exception of SBC-SWBT in Texas. The California Public Service Commission ("California PUC") stated in its 271 Order that a California PUC audit found problems with a "*significant percentage*" of Pacific Bell's reporting of intraLATA LPIC disputes. In light of the problems with Pacific Bell's practices as a non-neutral PC administrator, and for numerous other reasons, the California PUC found that grant of 271 authority to Pacific Bell would not be in the public interest. In order to mitigate the harm to the public interest, the California Commission determined that it would open an investigation to establish a neutral third-party PC administrator.

Vycera is not aware of any other state Commission that has found the need to audit the ILECs' PC dispute reporting in this manner, or that has determined the need for a proceeding to establish a neutral third-party PC administrator for a particular state. Accordingly, while the FCC apparently has not had cause to address these types of issues in prior 271 proceedings, there is ample evidence on the record, including the record of the California PUC's 271 proceedings, that Pacific Bell's anticompetitive practices in this regard require the Commission's attention in this proceeding.

Vycera's representatives reiterated during the meeting that the Commission should not grant Section 271 authority to Pacific Bell until and unless a neutral third-party administrator is implemented in California. Vycera argued that, at a minimum, the Commission should put in place protective measures to prevent Pacific Bell from continuing its anticompetitive practices in the intraLATA toll arena, and to prevent Pacific Bell from extending its practices to the in-region interLATA toll arena, which in turn would harm competition in the local exchange markets. The arguments that Vycera presented at the meeting regarding potential measures to address SBC-Pacific Bell's anticompetitive practices in this regard are summarized as follows:

1. SBC-Pacific Bell's attorneys have affirmatively stated that it is Pacific Bell's practice to register PC change disputes against other carriers as a result of its intraLATA toll win-back calls and letters. Pacific Bell is not a neutral PC administrator with respect to intraLATA toll service, and would not be a neutral PC administrator with respect to in-region interLATA toll service if its request for Section 271 authority is granted. There are no safeguards in place to ensure that Pacific Bell's representatives only record alleged PC disputes as a result of legitimate customer calls to Pacific Bell made solely for that purpose (*i.e.*, Pacific Bell representatives are not required to record their conversations with customers to document whether or not the customer ever stated that the original PC change was not authorized.)

2. Pacific Bell's practice of using its win-back calls and letters as the opportunity to solicit and create alleged PC change disputes violates the Commission's slamming rules, which forbid PC change administrators such as Pacific Bell from independently verifying subscriber PC change requests. (*See* 47 CFR § 64.1120(a)(2).)

3. Pacific Bell is undermining the Commission's rules by simply deferring attempts to independently verify subscriber PC change requests until a few days after the change has been processed (during the win-back stage). Deferring its proactive independent verification efforts until after the change has occurred also allows Pacific Bell to benefit financially (and harm its competitors) by automatically charging its competitor two times the PC change fee (regardless whether the customer actually disputed the PC change).

4. Vycera has third party verification ("TPV") to document that each of the allegedly disputed PC changes were authorized. However, Pacific Bell (pursuant to its California tariff(s)) does not allow carriers such as Vycera to provide TPV or any other evidence to rebut an alleged PC dispute. In most, if not all, cases where Pacific Bell has attributed allegedly disputed PC changes to Vycera (and charged the related fees to Vycera), the customer never filed a complaint with the California PUC or with the FCC, and there is no documentation (akin to a TPV or LOA) proving that the customer ever stated to a Pacific Bell representative that the PC change was not authorized.

5. Because the customer never filed a complaint (and probably never even stated to the Pacific Bell representative that the initial PC change was not authorized), there is no mechanism by which for carriers such as Vycera may contest the alleged PC disputes. There are no procedures under the California PUC or FCC rules whereby, in the absence of customer complaints, carriers such as Vycera may simply provide the Commission(s) with all of the relevant TPV recordings and/or LOA documentation for the Pacific Bell-allegedly disputed PC changes, request that the Commission(s) review the authorization evidence, and upon a Commission ruling that the PC changes were authorized, thereby receive a credit back from Pacific Bell for all of the alleged PC dispute charges assessed by Pacific Bell. The carriers are simply stuck paying Pacific Bell two times the PC change fee any time Pacific Bell *alleges* (without any documentation or other evidence) that a customer stated that he or she did not authorize the change away from Pacific Bell.

6. Vycera has documented that Pacific Bell has assessed alleged PC disputes and related fees to Vycera's account in cases where customers simply signed a "win-back" form agreeing to switch back to Pacific Bell, thereby *creating* the alleged PC dispute where the customer never stated that the original PC change was unauthorized in the first instance. (A striking example is discussed in Vycera's comments at pages 32-33, and attached at Exhibit 7 to Vycera's comments). Vycera believes that in many cases, if not most, Pacific Bell simply is *creating* the alleged PC dispute in the absence of any customer statement that the PC change was not authorized.

7. The Commission should prohibit Pacific Bell from registering any alleged PC disputes, and from charging competitors any PC change fees as a result of alleged PC disputes, until and unless the customer has filed a complaint with the California PUC or the FCC, and the relevant Commission has determined that a slam occurred. This potentially could be accomplished by requiring SBC-Pacific Bell to revise its current California tariff(s) governing PC dispute fees, and by requiring SBC-Pacific Bell to specify in any future tariff filing(s) that PC change fees will not be assessed as a result of an alleged PC dispute until and unless the appropriate Commission (the CPUC or the FCC) has ruled that a slam occurred.

8. The Commission also should prohibit Pacific Bell from *soliciting* alleged PC disputes in the course of its win-back efforts, or in response to in-bound customer calls. Vycera submits that it is improper for Pacific Bell representatives to attempt to verify a PC change submission, at any time, to include the win-back stage, and that it is improper for Pacific Bell representatives to register alleged PC disputes in connection with its win-back letters or calls. Pacific Bell is not a neutral PC administrator for intraLATA toll, and the California PUC has recognized that there are problems with a "significant number" of Pacific Bell's reported intraLATA toll disputes. Pacific Bell simply cannot be trusted to record alleged PC disputes and to assess PC dispute fees against its competitors in a neutral and impartial manner with regard to interLATA toll, or in-region interLATA toll (if and when it obtains 271 authority).

9. The Commission should require Pacific Bell to provide its win-back and other marketing scripts, and should require Pacific Bell to record its win-back calls (at least for an interim period) to ensure that Pacific Bell's representatives are not soliciting or otherwise simply creating alleged PC disputes (particularly if Pacific Bell remains the non-neutral PC administrator).

Please do not hesitate to contact us if you would like additional information regarding these issues.

Very truly yours,

Katherine A. Rolph

Rogena Harris
Katherine A. Rolph

Counsel for Vycera Communications, Inc.